

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
APPELLATE SIDE  
CRIMINAL APPEAL NO.198 OF 2002

Tabassum Khan Kayyum Khan .. Appellant  
versus  
The State of Maharashtra .. Respondent

Mr. Ayaz Khan & Rajendra Bidkar for the appellant.  
Mr. A.M. Shringarpure, APP for the State.

A N D

CRIMINAL APPEAL NO. 281 OF 2002

Ajit Gopal Chavan @ Rahul Rane & Ors. .. Appellant  
versus  
The State of Maharashtra .. Respondent

Mr. Rajendra Shirodkar for the appellant.  
Mr. A.M. Shringarpure, APP for the State.

CORAM : V.M. KANADE, J  
DATED : 23rd September, 2004

**ORAL JUDGEMENT:-**

1. Both these appeals are filed by the original accused challenging the judgement and order passed by the Special Court constituted under the MCOC Act 1999 and the appellant in both these appeals are convicted by the trial Court by judgement and order dated 15th and 17th January 2002. Since both these appeals arise out of a common judgement, they are being disposed of by this judgement. The appellant in Criminal Appeal no.198 of 2002 is original accused No.1 and appellants in Criminal Appeal no.281 of 2002 i.e. Ajit Gopal

Chavan, Sunil Kumar Devaji Bhedwale, Radheshyam Ramchandra Junwal, Rajesh Premchand Katoch, Ramesh Ramnath Shetty and Ajit Tukaram Sawant are the original accused nos. 2 to 7. All these appellants were convicted for having committed an offence u/s.120B of the IPC r/w sec.3(2) and 2(1)(a) of the MCOC Act 1999 and sentenced to suffer RI for five years and to pay fine in the sum of Rs.5,00,000/- each and in default to suffer RI for 1 year and 3 months. They were also convicted for the offence u/s.120-B r/w 307 of the IPC and section 3(1)(ii) of the MCOC Act 1999 and sentenced to suffer RI for five years and to pay fine of Rs.5,00,00/- each and in default to suffer RI for 1 year and 3 months. Appellant Tabassum Khan original accused no.1 was found guilty and convicted of the offence u/s.25(1-A) r/w sec.7 of the Arms Act and sentenced to suffer RI for five years. Accused no.7 was found guilty and convicted for the offence u/s.3(iv) of the MCOC Act and sentenced to suffer RI for seven years and to pay fine in the sum of Rs.5,00,000/- and in default to suffer RI for one year and six months. Accused nos.1 to 6 were acquitted for the offence punishable u/s.3(iv) of the MCOC Act 1999.

2. The prosecution case is that the original accused nos.1 to 7 appellants herein along with

absconding accused nos.8 to 10 hatched a criminal conspiracy between July 1999 and 10.11.1999, and conspired to commit organised crime and attempted to commit murder of the complainant Aziz Gulab Malik with a revolver on 10.11.1999 at about 11.p.m. in front of a restaurant at Andheri(E) Mumbai. The prosecution case is that on 11.11.1999 at about 4.00 a.m, information was received by the Andheri (E) Police station that a person by name Aziz Gulab Malik had sustained bullet injury on his back and was shot at by unknown persons. The injured Aziz Gulab Malik gave the First Information Report at about 3.00 a.m. and an FIR was registered. During the course of investigation, Shri Naval Driver took search of the residential premises of the accused no.1 Tabassum Khan and recovered two fire arms loaded with live cartridges. The appellant was arrested after she surrendered to Judicial Custody on 23rd February 2000. A proposal was made for prior approval u/s.23(1)(a) of the Maharashtra Control of Organised Crime Act 1999 and the Addl. Commissioner of Police granted approval by order dated 3rd April 2000. The tape recorded conversation between the appellant Tabassum Khan and absconding accused Chhota Shakeel were heard and transcribed and the panchnama was drawn in respect of the audio cassette which contained the said

conversation. The voice of absconding accused Chhota Shakeel was identified. Accused no.2 was arrested by DCB CID in C.R. no.102 of 1999. Sanction to prosecute the accused under the provisions of MCOC Act 1999 was granted by order dated 18.10.2000. Accused nos.3 to 6 were arrested in transfer warrant in this case on 29.8.2000. The statement of accused no.3 Sunil Bhedwale was recorded on 9.9.2000 in the presence of panchas. Charge-sheet was filed against the accused and charge was framed on 3rd April 2001. They pleaded not guilty to the said charge. Prosecution examined 44 witnesses. The trial court on the basis of the said evidence convicted the accused. The appellants have preferred this appeal against the said judgement and order.

3. In the present case so far as original accused no.1 is concerned, Tabassum Khan, the evidence against her is in the form of tape recorded conversation and the recovery of two fire arms from her residence. The allegation against the appellant Tabassum Khan is that she had paid certain amounts to Taran Arora at the instance of the complainant PW no.1 for purchasing a property. However, the said Taran Arora had sold the property to some other persons and had not returned the money. It was alleged by the prosecution that

accused no.1 Tabassum Khan contacted Chhota Shakeel on phone and hatched a conspiracy to kill PW no.1 Aziz Gulab Malik and as a result accused nos.2 to 7 along with absconding accused nos.8 to 10 attempted to commit murder of PW no.1 on 10.11.1999.

4. The prosecution case is that sanction to record the conversation of Tabassum Khan accused no.1 was granted on 2nd July 1999 by the Addl. Chief Secretary (Home) Government of Maharashtra u/s.5(2) of the Indian Telegraph Act and PW no.5 recorded the conversation. ON the basis of this conversation, prosecution has alleged that the accused no.1 had association with organised crime syndicate. So far as the evidence against accused No.1 in respect of charge u/s.307 is concerned, PW no.1 who is the complainant has not blamed the accused no.1. He has not stated that the accused no.1 had threatened him or they were on enemical terms at any time or that there was any motive for the accused no.1 to assault the complainant. So far as accused No.1 - Tabassum is concerned, the question which falls for consideration before this Court is i) whether there is any sufficient evidence on record to prove that the authorisation granted by the Addl.Chief Secretary was a valid authorisation u/s.5(2) of the Indian

Telegraphic Act. ii) Whether there was sufficient evidence to prove that the appellant no.1 Tabassum Khan had committed an offence u/s.307 r/w sec.120-B of the IPC. iii) whether the recovery of the fire arms from the premises of the accused no.1 Tabassum Khan had been proved beyond reasonable doubt by the prosecution and iv) whether there was any evidence to prove the association of Tabassum Khan with organised crime to convict her under the MCOC Act.

5. In order to establish the case against the accused no.1 Tabassum Khan under the MCOC Act, the prosecution is relying on the evidence of PW no.5 who recorded the conversation between Tabassum Khan and Chhota Shakeel. PW no.5 Ravindra Ambuji Wani has stated that he was working in the Crime Branch as PSI in the year 1999 and was working in the computer cell of the DCB CID Bombay, Unit no.2. He has stated that it was his duty to collect information regarding offences committed by organised crime and informed the same to his superior officer. He has stated that Shaikh Babu Shaikh Shakeel @ Chhota Shakeel was on the police record as a wanted criminal and he was presently based at Karachi at Pakistan. According to him, in June 1999, he has received secret information that one lady by name Tabassum having a mobile phone

was in communication with Chhota Shakeel based at Karachi, Pakistan. He therefore informed his superior Officer, verified the mobile phone number and made arrangement for facilities to listen to the mobile phone conversations between Tabassum and Chhota Shakeel.

6. PW no.5 has stated that on 20th July 1999 at 8.15 p.m, he heard the conversation between two people. One voice was that of the lady and the other voice was of a gentleman. Then he heard the words "C.S" He started recording the conversation. In the said conversation, there was a reference regarding the business of Taran and one Salil. Accused no.1 Tabassum thereafter stated that there was a transaction of land at Borivali and that one Aziz had lied to her to save Taran. At that time, male voice assured her that he would not leave him and that he had undertaken the responsibility of recovering the money claimed by the lady. He then removed the cassette and sealed it and signed on the label of the cassette. Thereafter, according to him in June 2000, ACB Dengle from the Andheri Police station met him and Shri Dengle narrated the case lodged at C.R. 490 of 1999 at Andheri Police station and informed him about the firing incident in which one Aziz Gulab Malik was

attempted to be killed. He thereafter went to the Andheri Police station on 2nd January 2000 along with the sealed cassette. ACP Dingle, PI Driver and API Prabhu were present. They called two panchas and tape recorded cassette was heard by this panchas. A transcript was prepared. thereafter, complainant Aziz Malik and Taran Arora were called to the police station who identified the male voice as that of Chhota Shakeel and female voice as that of lady Tabassum. PI Talwalikar identified the male voice in the conversation as that of Chhota Shakeel. The statement of panchas were taken on the labels fixed on the audio cassettes. PI Driver countersigned it. The learned counsel appearing on behalf of the appellant has taken me through the transcript of the video cassette. In my view, apart from stray reference to Taran Arora and Aziz, there is no conversation in the said cassette which would indicate there was a conspiracy to eliminate Aziz. In the said conversation, there is reference to various topics and it appears to be a general conversation relating to number of topics. There is also a reference to Kargil war. However from the said conversation, it is difficult to come to a conclusion that there was a definite conspiracy between Tabassum Khan and Chhota Shakeel to eliminate Aziz Gulab Malik PW no.1.

7. The law regarding interception of telephone conversation is quite well settled. The Supreme Court in its decision in the case of People's Union for Civil Liberties Vs. Union of India AIR 1997 S.C. 568 has laid down the circumstances under which the powers of interception of telegraphic conversation to be invoked. The Supreme Court in paragraph no.29 of the said judgement has observed as under:-

"The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5(2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order, or (v) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the competent authority

require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so.

The Supreme Court thereafter has observed in paragraph no.30 as under:-

"The above analysis of Section 5(2) of the Act shows that so far the power to intercept messages/conversations is concerned the Section clearly lays down the situations/conditions under which it can be exercised. But the substantive law as laid down in section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. It has been settled by this Court in Maneka Gandhi Vs. Union of India (1978) 2 SCR 621 :(AIR 1978 SC 597), that "procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right

itself". Thus, understood, "procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes".

8. The Apex Court thereafter observed that no procedure had been prescribed for the exercise of the power u/s.5(2) of the Act and that no rules had been framed u/s.7(ii)(d) of the Act for providing the precaution to be taken for preventing improper interception in disclosure of messages. The Supreme Court thereafter observed that it was necessary to lay down the procedural safeguards of the exercise of power u/s.5(2) of the Act in order to protect the right of privacy of a person. The Apex Court thereafter gave certain directions. It would be relevant and profitable to refer to these directions which are given paragraph no.35 which reads as under:-

We, therefore, order and direct as under:-

1. An order for telephone-tapping in terms of Section 5(2) of the Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Government not below

the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.

2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means (of) a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such person and in such manner as are described in the order.

3. The matters to be taken in to account in considering whether an order is necessary under Section 5(2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

4. The interception required under Section 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

5. The order under section 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date of issue. The authority which issued the order may, at any time before the end of two months' period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.

6. The authority which issued the order shall maintain the following records:-

- (a) the intercepted communications,
- (b) the extent to which the material is disclosed.
- (c) the number of persons and their identity to whom any of the material is disclosed.
- (d) the extent to which the material is copied, and
- (e) the number of copies made of any of the material.

7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.

9. There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order whether there has been any contravention of the provisions of Section 5(2) of the Act.

(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of

Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.

(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) of the Act, it shall record the finding to that effect.

From the directions which are given by the Apex Court in paragraph no.35, it can be seen that after the order of authorisation is granted by the competent authority it has to be sent to a review committee within 7 days. In the present case, there is no evidence to show that the said authorisation was sent to a review committee in 7 days. Similarly, the Officer intercepting message is required to maintain proper record regarding details of time, date, duration, particulars of persons etc. PW no.5 in his cross-examination has admitted that he had not maintained any data or record or log book about the interception. From the record, it appears that the order of sanction has been filed. However, the sanctioning authority has not been examined. A Division Bench of this Court in the case of State of Maharashtra Vs. JaiSingh Vadhusingh in Criminal Appeal no.1262 of 2002 has also relied on the ratio laid down by the Supreme Court in the case of

People's Union for Civil Liberties Vs. Union of India reported in AIR 1997 S.C. 568 and has observed that where there was no evidence to show that the requirement of "occurrence of public emergency or public safety was satisfied, there was a contravention of the provisions of Telegraph Act. In para no.6, the Division Bench has observed as under:-

"As a matter of fact, the interception of the telephone conversation was done, before the MCOC Act came into force, with effect from 24.4.1999. The interception so done was obviously done in view of the provisions of section 5 of the Indian Telegraph Act, 1887. However, the Supreme Court, in its decision, in case of People's Union for Civil Liberties Versus Union of India, reported in AIR 1997 SC 568 have explained the provisions of Section 5 of the Indian Telegraph Act and laid down the principle that for invoking the powers of interception of telegraphic conversation two requirements are necessary to be fulfilled:-

(i) that there is occurrence of any public emergency or the existence of the public safety interest AND

(ii) the Competent Authority under Sec.5(a) of the Act is empowered to pass an order of interception, after recording its satisfaction that it is necessary or expedient so to do in the interest of:-

- (i) .....
- (ii) .....
- (iii) .....
- (iv) Public Order;
- (v) For preventing incitement to the commission of an offence."

9. The Division Bench of this Court in the case of Bharat Shantilal Shah & ors. Vs. State of Maharashtra reported in 2003(Bom) (Criminal) 947, has stuck down the validity of the provisions of section 13 to 16 of the MCOC Act. Thus, the only provision under the authorisation can be sought by the police for intercepting the conversation is under the

provisions of section 5(2) of the Telegraph Act and the rules frames thereunder:-

"On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government

making the order or an officer thereof mentioned in the order.

.        Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

In my view the evidence of the recorded phone conversation cannot be considered. In the first instance, none of the five situations contemplated in para 29 of the judgment of the Supreme Court in PUCL case existed when sanction was granted by the competent authority. Secondly, in para 35 of the said judgment certain guidelines were laid down and certain directions were given to the concerned authorities. From the evidence, it can be seen that none of these guidelines have been followed. In the said paragraph, it has been stated that the authority should maintain certain records viz. (a) the intercepted communications, (b) the extent to which the material is disclosed, (c) the number of persons and their identity to whom any of the material is

disclosed, (d) the extent to which the material is copied, and (e) the number of copies made of any of the material. In the present case, except clause (a), the other record has not been maintained by the authority. Further, in clause 9 of para 35, it is laid down that there shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Committee is supposed to investigate whether the order under section 5(2) of the Act was a proper order or not. This procedure also has not been followed. Further, it can be seen from the cross-examination of P.W.5 that he has admitted that he had not maintained any data or record of log-book about the interception. The sanctioning authority has not been examined by the prosecution. Thus the ratio of the Judgment in the PUCL case (supra) so also in the cases of State of Maharashtra Vs. Jaisingh Vadhusingh in Criminal Appeal No.1262 of 2002 and Bharat Shantilal Shah & Others Vs. State of Maharashtra reported in 2003 Bom.C.R. [Cri.] 947 is squarely applicable to the facts of the present case. The said record and phone conversation cannot be taken into consideration. Since, this is the only piece of evidence for associating the accused with the Organized Crime

Syndicate, the conviction under the MCOC Act is quashed and set aside.

10. The accused no.1 Tabassum Khan is also charged u/s.307 of the IPC. The evidence against her is given by PW no.1 Aziz Gulab Malik and Pw no.26 Santosh Shirke. PW no.1 in his evidence has stated that on the date of the incident i.e. 10.11.1999, he had gone to the restaurant at about 6.00 p.m. He had gone to answer call of nature at about 10 to 10.30 p.m. The public urinal however was closed. He therefore, went near a secluded place near a telephone booth for urinating. At that time, he felt that an electric current had passed through his body and he fell down. When he regained consciousness, he noticed that there was blood oozing from his back. He was taken to Andheri Police station and then to Cooper hospital. He was operated and a bullet was taken out of his body. On the next day, his statement was recorded. In his entire testimony, he has not stated that Tabassum - accused No.1 was involved in the said incident, or that the people who had fired at him had done so at her instance. He mentioned that accused no.1 Tabassum had met him at Taran's Bungalow and he had assured her that in 4 to 5 days, Taran would pay the said amount. However,

when the amount was not paid he had scolded Taran. In the FIR, PW no.1 has stated that some unknown persons had fired at him from a revolver. No reference has been made by him about the transaction which Taran had with Tabassum. This witness therefore, does not implicate accused no.1. He has nowhere stated that the accused no.1 had threatened him or that accused no.1 was on enemical terms with him. From this evidence, it transpires that there was no motive for the accused no.1 to assault the complainant. The prosecution also has not examined Taran Arora who was an important witness who could have thrown some light on the said transaction and the involvement of accused no.1. The prosecution however has examined Santosh Shirke PW no.26 who is the partner of Taran Arora. PW no.26 also in his evidence does not implicate accused no.1. This witness was declared hostile by the prosecution. Thus, neither PW no.1 nor PW no.26 have implicated accused no.1. Thus, in my view prosecution has miserably failed in proving the role of accused no.1 in the offence of attempt to commit murder of PW no.1 Aziz Gulab Malik. The accused no.1 therefore, is liable to be acquitted of the said offence with which she is charged.

11. So far as the recovery of fire arms from the premises of accused no.1 is concerned, prosecution has examined PW no.15 who is the panch. This witness has also acted as a panch in MCOC Special case no.13 of 2000 and in the said case, this witness admitted that he had acted as a panch in the present case and had given false evidence on oath. This panch further admitted that he had acted as panch in Sessions Case no.1215 of 1995. In view of these admissions, it cannot be said that this witness is an independent witness and he appears to be under the control of the police. The panchnama at Exhibit P-49 indicates that at the time of the raid, the accused no.1 was bed-ridden and the only other person in the house was a girl of 19 years of age. Further, from the evidence of PI Naval Driver PW no.25 it can be seen that he had taken over the investigation on 11th November 1999 and on the same day, he had raided the house of accused no.1. He has stated that when he questioned accused no.1, she stated that she had kept two pistols in her cupboard for her protection. Accused no.1 had no reason to make that statement and it cannot be said that the statement is made u/s.27 of the Evidence Act. Thus, it is difficult to rely on the said recovery of the fire arms from the house of accused no.1. The possibility of planting these

fire arms in the house of the accused no.1 cannot be ruled out. Thus, in my view the recovery of fire arms in the house of accused no.1 is not established beyond reasonable doubt by the prosecution. The prosecution has miserably failed to prove this case against accused no.1 and she is liable to be acquitted of the charges which are levelled against her.

12. So far as the accused nos.2 to 7 are concerned, it is alleged that they were in contact with Chhota Shakeel on telephone who had instructed them on telephone to kill PW no.1. The evidence against the accused nos.2 to 6 is the confessional statement of accused no.6 which was recorded by PW no.7 Bipin Bihari, Dy. Commissioner of Police and the statement of PW no.7 Prakash Shetty who was the owner of STD booth, Sai Communications who has stated that the accused no.2 had made six calls from his telephone booth to Dubai on 8.10.99, 9.10.99, 11.10.99 and 13.10.99. PW no.8 Sayyed owner of STD booth turned hostile. PW no.9 Ravi Bane owner of STD booth, Laxmi Communications, he has stated that a telephone call was made on 19th July 1999 to Dubai on a particular number and again on the same day, another call was made. He has stated that on 23rd

July 1999, a call was made on another number at Dubai. He identified accused no.2 as the person who had made calls from the STD booth. Further evidence is given by PW no.10 Suresh Yadav who is the STD booth owner of Sarita Communications in which he has stated that on 16.9.2000, accused no.2 had made enquiries whether telephone calls could be made from his shop. He identified accused no.2 as the person who had gone to his shop on 16th September 2000. The prosecution then examined PW no.22 panch for the purpose of recording a statement of accused no.2 in which he had pointed out various communication centres from where he had made calls. The prosecution then relied on the evidence of PW no.13 Ashok Dubey who was the panch who recorded the statement of accused nos.3,4 and 5 who had pointed out the place where the offence had taken place. PW no.14 is the owner of STD booth who has identified accused no.3 in the Identification Parade and also in Court and he has stated that the accused had made calls from his booth. PW nos.42 and 43 are examined to prove that they had given a sim card to accused no.3. PW no.16 is the owner of Surya Communications did not identify the accused no.3 correctly. He was declared hostile. So far as accused no.6 is concerned, in order to prove the case against him,

prosecution examined PW no.19 Shaikh Wahab, PW no.20 Jitendra Waghmare, PW no.21 C. Fernandes and PW no.31 Brijilal Saligram Tiwari. The prosecution has not established any link between accused no.1 and accused nos.2 to 6. The prosecution in order to link the accused nos. 2 to 7 with the underworld elements have examined the owner of STD booth from where these accused have alleged to made phone calls. However, it is not established that the telephone calls which were made by them to Dubai were received by underworld elements or absconding accused. Therefore, there is no evidence to show that the underworld elements were in fact contacted by these persons. Even from the Identification Parade which had been held by PW no.3 Prabhakar, it can be seen that the procedure which was followed is not in conformity with the guidelines laid down by the High Court in the criminal manual.

13. Section 18 of the Maharashtra Control of Organized Crime Act, 1999 lays down that certain confessions which are made to the police officer are admissible in evidence. Section 18 reads as under:-

**"18. Certain confessions made to police officer to be taken into consideration.- (1)**  
Not withstanding anything in the Code or in

the Indian Evidence Act, 1872 (I of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not below the rank of the Superintendent of Police and recorded by such police officer either in writing or on any mechanical devices like cassettes, tapes or sound tracks from which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator;

Provided that, the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The confession shall be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.

(3) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he is satisfied that it is being made voluntarily. The concerned police officer shall, after recording such voluntary confession, certify in writing below the confession about his personal satisfaction of the voluntary character of such confession, putting the date and time of the same.

(4) Every confession recorded under sub-section (1) shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Special court which may take cognizance of the offence.

(5) The person whom a confession had been recorded under sub-section (1) shall also be produced before the Chief Metropolitan

Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under sub-section (4) alongwith the original statement of confession, written or recorded on mechanical device without unreasonable delay.

(6) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate shall scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon.

The Rules which are framed under the said Act viz. the Maharashtra Control of Organized Crimes Rules, 1999 provide the manner in which the confession is to be recorded. Rule 3 of the said Rules lays down the said procedure.

**"3. Procedure for recording of confession under section 18 of the Act.-** (1) The Police Officer recording a confession under section 18 of the Act shall record it as provided in sub-section (2) to (7) of this rule.

(2) When the person whose confession is to be recorded is produced before such Police Officer, no Police Officer who has taken part in the investigation of the offence in connection with which the confession is being recorded, shall be allowed to remain present at the time of recording of the confession.

(3) The Police Officer recording the confession shall explain to the person making the confession that he is not bound to make such confession and that if he does so, such confession may be used as evidence against him.

(4) After having been so explained and

warned, if such person adheres to his intention and insists on making a confession, the concerned Police Officer, who is to record the confession shall give, not less than 24 hours time to the person making the confession for reconsideration of his decision to make confession.

(5) After elapsing of the time given under sub-rule (4), when such person is again brought before such Police Officer, he shall once again ascertain from the person intending to make the confession whether he is still willing to make a confession. Upon such person reiterating his desire to make a confession, the concerned Police Officer shall record in writing the confession of such person in the same language and as narrated by the confessor.

(6) the confession recorded under sub-rule (5) shall, if it is in writing, be signed by the person who has made such confession and by Police Officer, who has recorded the said confession. Such Police Officer shall, under his own hand, also make a memorandum at the end of the confession to the following effect:-

"I have explained to (name of the confessor) that he is not bound to make a confession and that, if he does so, any confession that he makes, may be used as evidence against him and I am satisfied that this confession has been made voluntarily. It has been made before me and in my hearing and has been recorded by me in the language in which it is made and as narrated by, the confessor. I have read it over to the confessor and he has admitted it to be verbatim and correct, and containing also full and true account of the confession/statement made by him."

(7) Where the confession has been recorded on any mechanical device, the memorandum referred to in sub-rule (6) above, in so far as it is applicable, shall be incorporated in

the form of a declaration made by the Police Officer recording the confession, by recording such declaration on the mechanical device at the end of the confession to the effect that the confession recorded on the mechanical device has been correctly recorded in his presence and hearing and that the recorded statement/confession has been played back to the confessor and after hearing it, it has been admitted by him to be full, correct and without any technical faults in recording.

(8) The Police Officer recording the confession shall, after forwarding the certified copy of the confession made or retraction, if any, thereof, to the Chief Magistrate or the Chief Judicial Magistrate as provided in sub-section (4) of section 18 of the Act and after ascertaining that the Chief Magistrate or the Chief Judicial Magistrate has as provided in sub-section (6) of the said section 18, forwarded the confession to the Special Court for taking cognizance of the offence, supply a copy of the confession recorded by him to the Investigating Officer, who is conducting investigation into the offence in connection with which, or relating to which, such confession has been made, for the purpose of investigation."

From the perusal of Rule 3, it can be seen that the the police officer before whom the person is produced for recording confession should be a person who has not taken part in the investigation of the offence and it is further stated that such a person shall not be allowed to remain present at the time of recording of the confession. Sub-clause (3) of Rule 3 further lays down that the police officer recording the confession shall inform the person making the

confession that he is not bound to make such confession and if his confession is so recorded, it would be used against him in evidence. In the present case, confession of accused No.6 - Ramesh was recorded by P.W. 27 - Bipin Bihari, Deputy Commissioner of Police. It is an admitted position that the accused was in the custody of MIDC Police Station and P.W. 2 - Bipin Bihari was the Deputy Commissioner of Police and was in charge of the Zone which falls under the MIDC area. Thus, there is a serious lapse in recording the confession as it is directly contrary to clause (2) of Rule 3 of the said Rules. There is thus a serious lacuna in recording the confession of accused No.6. P.W. 27 - Bipin Bihari was in charge of the entire Zone and, as such, it cannot be said that he was an independent person as prescribed under the Rules. It is, therefore difficult to rely on the said confession which is recorded by P.W. 27 and, therefore, this piece of evidence will have to be discarded.

14. So far as the other evidence which is adduced by the prosecution against the accused Nos. 2 to 7 is concerned, the prosecution has examined P.W. 7 Prakash Shetty who was the owner of Sai Communication. Prakash Shetty in his evidence has

deposed that he was the owner of Sai Communication and STD, ISD and PCO facilities were available in the STD Booth. He has stated that he used to maintain a note-book in which entries were made regarding the relevant calls which were made from his STD Booth. He has stated that on 8/10/1999, three calls were made from his Booth to foreign country and the duration of call was 83 seconds. He has further stated that on 9/10/1999, the customer had made a call on a particular number and duration was 150 seconds. Similarly, on 11/10/1999, a call was made on the same number by the same customer and the similar calls were made on 12/10/1999 and 13/12/1999 on the same number and the calls were of various durations. This witness has identified accused No.2 as the person who made the telephone calls from his STD Booth. In the cross-examination, this witness has stated that on an average 200 customers visit his STD Booth and make calls during the course of the day. From the evidence of this witness it can be seen that no identification parade was held in respect of this accused No.2 to show that he was the same person who had made calls. In the absence of an identification parade, it is difficult to rely on the statement of this witness. Even if it is accepted that accused No.2 had made telephone calls from the

STD Booth, there is no evidence on record to show that number on which the calls were made belonged to any gangster. The prosecution case is that an attempt on the life of Aziz was made on the instructions of a gangster based in Dubai and that these accused were responsible for the said action and that they were in touch with these gangsters on phone. It has not been established by the prosecution that the number on which the telephone calls were made belonged to any gangster. Nexus between the accused and the gangsters has not been established. This evidence, therefore, is of no assistance to the prosecution.

15. Prosecution has, thereafter, examined P.W.8 - Nooralam Sayyed who is the owner of STD Booth viz. Master Communication. This witness has turned hostile and his evidence, therefore, does not assist the prosecution case.

16. Prosecution has thereafter examined P.W. 9 - Ravi Bane who is the owner of STD Booth Laxmi Communication. This witness has stated in his evidence that on 16/09/2000, Police had gone to his shop with accused No.2 - Ajit. Inquiries were made with Ravi Bane - P.W.9 as to whether calls were made

from his Booth by the accused. This witness, after checking his register, has stated that the accused No.2 had made telephone calls on a particular number at Dubai and on the same day another call was made on the same number and, thereafter, one more call was made on the same number on 23/7/1999. This witness identified accused No.2 in the court as the same person who had made calls from his STD Booth. So far as this witness is concerned, again no identification parade was held by the police and this witness had identified accused No.2 for the first time in court. In the evidence, it has come on record that the police had brought this witness to the shop. In the first place, in the absence of identification parade, it becomes difficult to rely on first identification in court. Further, there was an ample opportunity for this witness to see this accused in the police station and at the shop where he was brought by the police. This evidence also, therefore, does not advance the case of the prosecution. Even if it is accepted that accused No.2 made telephone calls from the STD Booth, there is no evidence to show that the number belonged to a particular gangster. Further, there is no evidence as to what conversation took place between the two persons. This evidence, therefore, also does not assist the prosecution case.

17. Prosecution has, thereafter, examined P.W. 10 - Suresh Yadav who is the owner of STD Booth Sarita Communication Center. This witness has stated in his evidence that on 16/9/2000, Police had come with accused No.2 to his shop and had made inquiries whether he had made telephone calls from his shop. He has stated that he had shown his register to the Police and he identified accused No.2 - Ajit as the person who was brought by the Police to his shop. The evidence of this witness also does not assist the prosecution case. This witness does not state that accused No.2 was the same person who was making telephone calls from his Booth. Further, no register is produced by this witness which could establish that telephone calls were made to a particular number.

18. Prosecution has further examined P.W. 22 who is a panch witness who has signed the panchanama P-63. This witness has stated in his evidence that he was called to the Police Station on 16/9/2000 to act as a panch. He has stated that the accused No.2 made a statement and pointed out various communication centers from where he had made telephone calls. The panch identified the accused No.2 in court. This

witness does not say what was the conversation which took place. There is no evidence to establish that the telephone calls were made to a gangster at Dubai. In the absence of this evidence, merely because accused No.2 has shown STD Booth from where he had made telephone calls, that by itself would not take the prosecution case any further.

19. Prosecution has examined P.W. 33 - Prabhakar Inamdar who was the Special Metropolitan Magistrate who held the identification parade in which five accused persons were identified viz.(1) Sunil Kumar @ Rajendra @ Sajinda Devaji Bhendwal, (2) Radheshyam @ Ramchandra Junwal, (3) Rajesh @ Pinky Premchand Katoch, (4) Ramesh @ Tambi Ramnath Shetty and (5) Vishnukumar Laxmichand Kumawat. He has stated that witness Joseph Jokhim Bargoza identified Sunil Kumar @ Rajendra @ Sajinda Devaji Bhendwal. This witness has stated that he had seen this accused as the same person who had fired shot. He has further identified Radheshyam @ Vinod Junwal. He has stated that he has also seen this person shooting. This witness (P.W. 33) has stated that, thereafter, panch brought further witness viz. Murli Sanjaba Pujari who identified Sunil Bhendwal and this witness also identified Radheshyam Junwal. P.W. 33 has stated

that the second witness Murli Pujari informed him that he had seen both the accused running away from the place of incident. This witness, however, did not identify the others. P.W. 33 has stated that he asked the panch to bring third witness Dinesh Lallan Tiwari who identified Radheshyam Junwal. P.W. 33 has stated in his evidence that Dinesh Tiwari informed him that he has seen this person making telephone call from his STD Booth. P.W. 33 has further stated that the panch brought another witness Edward Rodrigues who identified accused Sunil Kumar Bhendwal as the same person who had come to his Telephone Booth for making telephone call. Thereafter, the panch brought witness Sandeep Mahadev Kadam who identified Sunil Kumar Bhendwal. Sandeep Kadam informed P.W. 33 that Sunil Kumar had come to his telephone Booth and had made telephone calls. He also identified Radheshyam Junwal as the person who had made telephone calls from his Booth. From the evidence of this witness, it can be seen that Special Metropolitan Magistrate had not followed the procedure laid down in the guidelines of the High Court. Further, there is serious lacuna in the test identification parade as the five suspects were kept in one parade which is clearly contrary to the guidelines which are laid down by the High Court.

Therefore, it is not possible to rely upon the test identification parade.

20. Prosecution has, thereafter, examined P.W. 39 Mohd. Ismail. This witness has stated that he has given Sim Card to accused No.2. He has stated that he has a shop at Dadar where he sells Sim Cards and that accused No.2 had purchased the Card from his shop. He has identified accused No.2 as the same person who had purchased the Sim Card. This evidence also does not advance the prosecution case any further as, firstly, there is no record to show that the Sim Card was sold to accused No.2. Further, there is no evidence to show that accused No.2 had made telephone calls on the basis of this Sim Card to any of the gangsters. This evidence, therefore, does not advance the case of the prosecution in any manner.

21. Prosecution has, thereafter, examined P.W. 43 - Vikas Phulkar. P.W. 43 - Vikas has stated that he was working in Hutchison Max Telecom Ltd. as a Security Officer. He has stated that the Deputy Commissioner of Police, Crime Branch, Mumbai had sought a confidential information in respect of the subscriber in respect of No. 9820162491 from period

28/8/1999 to 12/1/2000 as also the details of the incoming and outgoing calls for the same number from 1/9/1999 to 12/1/2000. He has stated that the information was supplied and the printouts were given to one Rahul Rane. P.W. 43 has identified the printouts. In his cross-examination, he has stated that the Company appoints dealers in the City of Mumbai to sell Mobile and Sim Cards and the retailer was entitled to purchase pre-paid cards from the dealers and then sell it to customers. However, it was not possible to keep the track of the dealer selling the cards to the retailers as the Company did not have record of retailers. From the evidence in the cross-examination of this witness, it can be seen that the Sim Cards can be sold by dealers and retailers to any person and the identity of the persons to whom Sim Card is sold cannot be established. In the absence of this information, the evidence of this witness and the record of the telephone call which was made from the Sim Card does not assist the prosecution case. As long as the identity of the person who has used the Sim Card is not revealed, the information about the calls which were made during the particular period does not serve any useful purpose. Thus so far as accused No.2 is concerned, the evidence adduced by the prosecution

does not connect him with the offence which has been allegedly committed by him. There is no evidence to connect accused No.2 with the member of Organized Crimes. It is not established that he has received instructions from the members of the Organized Crimes to commit assault on Aziz. There is no evidence to establish that there was a conspiracy to commit murder of Aziz.

22. So far as accused No.3 - Sunilkumar Devaji Bhendwal is concerned, prosecution has examined P.W. 13, P.W.14, P.W.16.

. P.W.13 - Ashok Dube is the panch who has been examined by the prosecution. This witness has stated that he was called by the Constable to Andheri Police Station. He has stated that one person was standing and his face was covered with cloth. He has stated that the said person made a statement regarding pointing out the spot. Signature of this witness was obtained by the Police Officer after the statement of the accused was recorded. This witness has stated that he could not identify the accused because his face was covered. He identified the document Ex.P-44-A. The evidence of this witness does not assist the prosecution because he has failed to

identify the accused before the Court.

. Prosecution has, thereafter, examined P.W 14 who is the owner of STD Booth. The name of this witness and his address were concealed as the witness was afraid of his life. The name and address of this witness was kept in an envelope marked as Ex.P-46. This witness has stated that he was the owner of STD Booth at Andheri. This witness has identified the accused No.3 in the identification parade which was held by the Special Executive Magistrate and also in the Court. Even if the evidence of this witness is accepted, it only shows that accused No.3 had made telephone calls from the Booth. Since no further link has been established between this accused and the person to whom the telephone calls were made, merely by stating that telephone calls were made from his Booth will not assist the prosecution case in any manner.

. Prosecution has, thereafter, examined P.W. 16 who is the owner of STD Booth. The name of this witness and his address also has been concealed at his request and it is kept in a sealed envelope at Ex.P-48. This witness did not support the prosecution case and the prosecution declared him as

hostile witness. Further, in his evidence, he identified wrong person. Therefore, in any case, his evidence does not assist the prosecution.

23. Prosecution then has examined P.W. 13 - Ashok Dube in support of its case against accused No.4 - Radheshyam Ramchandra Junwal. P.W.13, however, did not identify the accused No.4 in Court and, therefore, in his substantive evidence which was given in the court, the witness has not identified the accused. The evidence of this witness does not advance the case of the prosecution in any manner.

24. Prosecution has, thereafter, examined P.W. 30. This witness has stated that accused No.4 had purchased a sim card from his shop. He has also identified the accused No.4 in the Court as the person who had purchased sim card from his shop. Even assuming that this witness has identified the accused No.4 as the same person, who purchased the sim card from his shop, his evidence is not of any assistance as it is not established that the accused No.4 had made telephone calls to absconding gangsters. In the absence of any evidence to show that the telephone calls were made to a particular person and as long as there is no evidence to show

what was the conversation between two persons, merely by identifying the accused as a person who has purchased the sim card does not help the prosecution case in any manner.

25. In order to establish its case against accused No. 5 Rajesh Premchand Katoch, the prosecution has relied upon the evidence of P.W 13 - Ashok Dube. This witness did not identify accused No.5 or any one else in the Court.

26. Prosecution has, thereafter examined P.W. 14. His name and address is kept secret. This witness has stated in his evidence that accused Nos. 3 and 4 had come to his STD Booth at Andheri. However, he did not identify accused No.5. This witness, even if his evidence is accepted, cannot take the prosecution case any further as it is not established that telephone calls were made to any known gangster in Dubai. Further, it is not established as to what was the conversation between the accused and the person at Dubai where the calls were made. In the absence of this evidence, merely by stating that accused Nos. 3 and 4 had made telephone calls to a particular number does not establish any fact.

27. Prosecution has then examined P.W. 37 - Anil Jayram Kharade. He has stated that he was P.I. attached to MIDC Police Station. He has stated in his evidence that he had assisted P.I. Marathe in the investigation of case being C.R. No.272/99 of MIDC Police Station. He has further stated that on 21/7/2000, the Crime Intelligence Unit, Andheri informed him that five person were detained by them viz. Sunil Bhendwal, Radheshyam Junwal, Rajesh Katoch, Vishnukumar Kumawat and Ramesh Ramnath Shetty for having committed an offence on 9/12/1999 in front of Jokhim Cottage at B. Cross Road, Andheri (E), Mumbai.

28. So far as accused No. 7 - Ajit Tukaram Sawant @ Kalya is concerned, prosecution examined three witnesses i.e. P.W 18, P.W.20 and P.W.21.

. P.W. 18 - Shaikh Wahab was a landlord from Pune. This witness turned hostile and did not support the prosecution case.

. P.W. 20 - Jitendra V. Waghmare also turned hostile and did not support the prosecution case.

29. Prosecution then examined P.W. 21 -Cajetan

Poque Fernandes. This witness has stated that he knew Shaikh Farooq Shaikh Wahab and that he also knew Jitendra @ Jitu Waghmare who was the compounder at Safalya Hospital, Pimpri, Pune. He has stated that he knew Jitendra Waghmare because his mother was taking treatment in Safalya Hospital. He has stated that in March, 2000 Jitendra Waghmare came to him as he wanted residential accommodation for his friend. He, therefore told Waghmare to approach his mother. He further stated that his mother introduced Jitendra Waghmare to Shaikh Wahab (P.W.18). He has thereafter stated that in September, 2000 police came to his residence and they took him to the residence of Mr. Wahab. One boy was brought by police and he was asked whether he knew the boy which was brought by the police. This witness, however, stated that he did not identify the boy. He has further stated that the police told the name of this boy to him. He has stated that he could not identify that boy in the Court. This witness, therefore, also does not assist the prosecution case in any manner.

30. Thus in the entire evidence which is brought on record, no link has been established between accused No.2 to 7. There is no evidence brought on record to establish that accused Nos. 2 to 7 had any

connection with any member of organized crime or crime syndicate. Merely because some booth owners have stated that some of the accused had made telephone calls from their booth to a number in Dubai, even if their version is accepted, it does not establish that these accused have received instructions from gangsters from Dubai. The confession which is recorded by Bipin Bihari cannot be accepted as a voluntary confession in view of the noncompliance of the rules. It has come in evidence that the accused were arrested and investigation was being carried out by the Police Officers who were directly under the control of Bipin Bihari - P.W. 27. Thus, P.W.27 being a person who was in over all control of all the investigation cannot be said to be an independent person who could have recorded the confession of accused No.6. There is no other circumstantial evidence or direct evidence to connect the accused with the commission of offence or an attempt to commit the murder of Aziz. In view of this, I have no hesitation in coming to the conclusion that the prosecution has miserably failed to establish their case against accused Nos. 1 to 7.

31. In the result, I am of the view that prosecution has not proved the case against the accused nos.1 to

7 beyond reasonable doubt and there is no evidence to connect these accused to the commission of the said offence with which they are charged. The appellant accused nos.1 to 7 are therefore, acquitted from the offences with which they are charged.

32. Both the appeals are allowed.

33. The appellants be released forthwith unless they are required in any other case. Since the appeal is allowed, passport of appellant Tabassum Khan be returned expeditiously.

V.M. KANADE, J